STATE OF MICHIGAN

COURT OF APPEALS

CITY OF CHARLEVOIX,

Plaintiff-Appellee,

v

MICHIGAN MUNICIPAL LEAGUE LIABILITY & PROPERTY POOL,

Defendant-Appellant.

UNPUBLISHED
December 19, 2006

No. 271405
Charlevoix Circuit Court
LC No. 05-094120-CK

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant, Michigan Municipal League Liability & Property Pool, appeals as of right from a grant of summary disposition in favor of plaintiff, City of Charlevoix. Defendant asserts the trial court erred when it determined the insurance policy issued by defendant covered losses suffered by plaintiff, its insured. We reverse and remand for entry of judgment in favor of defendant.

A trial court's grant or denial of summary disposition is reviewed de novo on appeal. *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 40; 709 NW2d 589 (2006). The interpretation of a contract is also a question of law that is reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

I. Facts

Plaintiff awarded a contract to CCMS Associates, Inc. (CCMS) to complete a construction project for improvement of roads, streets, and underground utilities. The contract required CCMS to provide performance, payment and maintenance bonds. United Fire and Casualty Company (United Fire) was the payment bond surety, the performance bond surety, and the maintenance and guarantee bond surety on the project. CCMS and United Fire had an Agreement of Indemnity, in which CCMS assigned its rights to payment under its contract with plaintiff to United Fire.

CCMS subsequently experienced difficulty paying its subcontractors. United Fire notified plaintiff that payment bond claims had been made, that CCMS had assigned its rights under an indemnity agreement to United Fire, and demanded United Fire's name be placed on all contract payment checks. However, plaintiff issued the final contract payment, in the amount of

$222,978.36, payable to CCMS only. CCMS negotiated the check and failed to remit payment of the funds to United Fire.

United Fire sued plaintiff, alleging CCMS breached the construction contract and/or the payment and performance bonds, and that plaintiff had breached its duty to include United Fire as a payee on the check. Plaintiff forwarded the claim to defendant, its insurer, but defendant rejected the claim, denying it had a duty to defend or to indemnify. The coverage document between plaintiff and defendant provided coverage for "wrongful acts" of public officials. However, defendant asserted that two exclusions in the insurance policy barred its coverage of the claim. In light of defendant's rejection of the claim, plaintiff paid United Fire $222,978.36, in settlement. Plaintiff then commenced this lawsuit to enforce coverage under the policy issued by defendant.

II. Analysis

"[I]t is fundamental that a surety, when required to pay its principal's obligation, is entitled to reimbursement." *Ellis v Phillips*, 363 Mich 587, 596; 110 NW2d 772 (1961). United Fire pursued reimbursement from plaintiff to secure the payment of monies owed to CCMS under the original contract. Defendant asserts that because United Fire's claim against plaintiff arose out of a breach of contract that coverage under their policy is expressly precluded.

"An insurance policy must be enforced in accordance with its terms." *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). If the language of the contract is clear and unambiguous, this Court will apply the terms as written. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992). "Similarly, in applying exclusionary provisions, this Court strictly construes the policy language. If the policy language is clear and unambiguous, it must be applied as written." *Michigan Basic Prop Ins Assoc v Wasorovich*, 214 Mich App 319, 323; 542 NW2d 367 (1996) (citations omitted). "Indeed, this Court will not countenance holding 'an insurance company liable for a risk it did not assume.'" *Id.* (citation omitted). Notably, defendant's policy with plaintiff specifically excludes from coverage "any claim based upon . . . breach of contract."

However, plaintiff contends that United Fire's interest arose in equity, not contract. Plaintiff reasons that because CCMS assigned its right to payment from plaintiff to United Fire, "the trial court correctly determined that . . . the City's obligation to United Fire arose by operation of law under equitable subrogation" and that "there was no contractual relationship" between United Fire and plaintiff. However, it is undisputed that CCMS formally assigned its right to payment to United Fire by execution of an indemnity agreement. Plaintiff has cited no binding authority for the proposition that the relationship between United Fire and plaintiff arose in equity rather than in contract. Plaintiff merely argues that defendant's "reliance on equitable subrogation is inherently mutually exclusive with any claim of breach of contract." This assertion is erroneous. This issue was previously addressed by this Court in *American Oil Co v L A Davidson, Inc*, 95 Mich App 358; 290 NW2d 144 (1980). In *American Oil Co* we held that a surety does not waive its right to assert equitable subrogation by perfecting an assignment of accounts. Assignment rights are independent of those derived from equitable subrogation. *American Oil, supra* at 361. Therefore, defendant's ability to assert equitable subrogation was neither contradictory nor exclusionary of the asserted contract rights.

Specifically, plaintiff asserts that the obligation, which arose, was not contractual in nature because it was not based on a written agreement between plaintiff and United Fire and, hence, there existed no mutuality of agreement between the parties. See *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). However, an obligor generally need not give its consent to the assignment to be held liable to an assignee after notice of an assignment. See *Rodgers v Torrent*, 111 Mich 680, 682-683; 70 NW 335 (1897); *Burkhardt v Bailey*, 260 Mich App 636, 652-654; 680 NW2d 453 (2004). Although, an assignment in itself lacks the mutuality of agreement necessary to establish a claim for breach of contract, "[t]he assignment transaction is a conveyance of a contract right . . . ." 9 Corbin, Contracts, § 860, p 372. "An assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Burkhardt, supra* at 653. In *First of America v Thompson*, 217 Mich App 581, 587; 552 NW2d 516 (1996), this Court observed that an "assignee stands in the shoes of an assignor and acquires the same rights the assignor possessed." Thus, the assignee has a legal right if the assignor had one, since "a subrogee has the same cause of action as the subrogor." *Auto Club Ins Ass'n v New York Life Ins Co*, 440 Mich 126, 133-134; 485 NW2d 695 (1992).

Further, plaintiff argues that the breach of contract exclusion was not applicable because liability was imposed under operation of law. Plaintiff relies on *Lebow Assoc, Inc v Avemco Ins Co*, 439 F Supp 1288, 1291 (ED Mich, 1977), for the assertion that a breach of contract exclusion in an insurance policy "is inoperative when the liability of the insured assumed under an express contract with the third party is coextensive with the insured's liability imposed by law." In addition to being factually distinguishable from the instant case, *Lebow* has no binding precedential effect. Although a Michigan court may choose to agree with the analysis of a federal court decision, "federal court decisions are not precedentially binding on questions of Michigan law." *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 364; 604 NW2d 330 (2000). More importantly, we must follow prior published decisions of this Court and our Supreme Court. MCR 7.215(J)(1); *Holland Home v Grand Rapids*, 219 Mich App 384, 394; 557 NW2d 118 (1996).

Specifically, plaintiff asserts United Fire's claim arose from statutory liability under MCL 440.9406(1), which states, in pertinent part:

> [A]n account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge its obligation by paying the assignor. [MCL 440.9406(1).]

This statute is part of Article 9 of the UCC, which applies to secured transactions in commercial financing. MCL 440.9109. However, Article 9 is not applicable to indemnity agreements between a contractor and surety or to the rights acquired by a surety through equitable subrogation. *Old Kent Bank v City of Detroit*, 178 Mich App 416, 420-421; 444 NW2d 162 (1989) (citation omitted). Hence, MCL 440.9406(1) does not impose statutory liability.

In light of our holding, defendant's alternative argument regarding exclusion of coverage "arising out of an insured's activities in a fiduciary capacity or as a trustee" is rendered moot and need not be addressed by this Court. *Dessart v Burak*, 252 Mich App 490, 495; 652 NW2d 669 (2002).

We reverse the trial court's grant of summary disposition to plaintiff and denial of defendant's motion for summary disposition and remand this case to the trial court for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot